

FILED
U.S. Bankruptcy Court
WDNC, Charlotte, NC

JUN - 2 2001

Geraldine Treutelaar Crockett,
Clerk
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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

JUDGMENT ENTERED ON 6/2/00

In Re:

CAROLE L. GROVE,

Debtor.

Case No. 97-51651

Chapter 7

In Re:

HUGGER, INC.,

Debtor.

Case No. 97-51650

Chapter 7

CAROLE L. GROVE, and JAMES T.
WARD, Trustee in Bankruptcy
for Carole L. Grove,

Plaintiffs,

Adversary Proceeding
No. 98-5062

vs.

BARRETT L. CRAWFORD, Trustee in
Bankruptcy for Hugger, Inc.,

Defendant.

Adversary Proceeding
No. 98-5062

BARRETT L. CRAWFORD, Trustee in
Bankruptcy for Hugger, Inc.,

Third-Party Plaintiff,

vs.

THOMAS D. GROVE,

Third-Party Defendant.

AMENDED ORDER DENYING IN PART AND GRANTING IN PART
BOTH PLAINTIFF'S AND THIRD-PARTY DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT

This matter was heard on March 27, 2000, upon the motions of Plaintiff Carole L. Grove and Third-Party Defendant Thomas D. Grove to alter or amend this Court's Order dated February 11, 2000. That Order denied in part and granted in part both Plaintiff's and Third Party Defendant's motions for summary judgment. Plaintiff argues that the Court applied the incorrect statute of limitations to the Hugger Trustee's claims for breach of fiduciary duty. The Third Party Defendant argues for a summary judgment ruling that any claims by the Hugger Trustee against the Groves would not be joint and several. Having considered the matter further, the Court believes its earlier ruling was correct. However, in order to clarify the reasoning behind the decision, the undersigned elects to withdraw the February 11, 2000 Order, and to issue this Amended Order.

BACKGROUND

The Court heard a motion for partial summary judgment filed by Carole L. Grove ("Debtor"), and a motion for summary judgment filed by Thomas D. Grove ("Tommy Grove"), on December 14, 1999. Responses were filed to both motions by Barrett L. Crawford, the bankruptcy trustee for Hugger, Inc. ("Hugger Trustee").

The Debtor and Tommy Grove ran a textile company known as Hugger, Inc. ("Hugger"), which was placed in an involuntary bankruptcy on November 25, 1997. The Debtor filed an individual bankruptcy case immediately thereafter on November 26, 1997. On August 11, 1998, the Hugger Trustee filed a proof of claim in the individual Debtor's estate for \$4,321,761.05. The Debtor responded by filing an adversary complaint objecting to the Hugger Trustee's claim. The Hugger Trustee counterclaimed and joined Tommy Grove as a third party defendant. The Debtor and Tommy Grove then filed summary judgment motions regarding the Hugger Trustee's various

claims. Tommy Grove's motion also requested set-off under 11 U.S.C. § 553.

The Hugger Trustee's counterclaim against the Debtor sought a recovery of approximately four million dollars, based primarily on theories of breach of fiduciary duty and officer advances. Likewise, the Hugger Trustee's claim against Tommy Grove was based on breach of fiduciary duty and officer advances.

In their summary judgment motions, the Debtor and Tommy Grove asserted that the Hugger Trustee's causes of action were barred by a three year statute of limitations. The Hugger Trustee concedes that the claims to recover officer advances, being accounts receivable, are governed by a three year statute of limitations. However, he says the officer advance account debts were reaffirmed through payments against the debts. The Trustee contends the fiduciary duty claims are subject to a ten year statute of limitations and are not time barred.

The Court concludes that as a matter of law, the officer advance accounts were not reaffirmed, and that these receivable claims are in fact time barred. However, the claims for breach of fiduciary duty, including any breach for failure to collect the aforementioned officer advances, are governed by a ten year statute of limitation and are not stale. Third Party Defendant Tommy Grove's request for set-off is not ripe, and therefore summary judgment is improper as to it. His partial summary judgment motion based upon the nature of any liability owed to the Hugger Trustee is a question of fact, and again the motion must be denied.

DISCUSSION

Summary Judgment Standard

A court may grant summary judgment only if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. FED.R.Civ.P. 56(c) as applied by BANKR.R.PRO. 7056; Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The burden rests initially on the movant to show the court that there is an absence of genuine issue concerning any material fact and that the non-movant cannot prevail. Celotex, 477 U.S. at 325. The non-moving party then must show that there is evidence from which a jury might return a verdict in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). The court must accept all of a non-movant's evidence as true and will view all inferences drawn from the underlying facts in the light most favorable to the non-moving party. Id. 477 U.S. at 255.

Officer Advances Account

The Hugger Trustee's claims against the Debtor and Tommy Grove for unpaid officer advances owed to Hugger are based upon a ledger titled "Accounting for Officers" which was maintained by Hugger's accountant, Capps, Foster & Company ("Capps Foster").¹ Capps Foster performed audits and prepared tax returns for Hugger. As part of the year end audit process Capps Foster would take the items identified by the bookkeeper of Hugger as officer advances and

1

Initially, it may seem strange that the Hugger Trustee is attempting to support these claims by such indirect evidence, rather than by internal source documents. However, the current Hugger records were lost prior to bankruptcy, due to the failure of one or both of the Groves to preserve them and/or turn them over to the Hugger Trustee.

would create a worksheet listing them with a cumulative balance. Capps Foster ceased performing audits for Hugger in 1992, but still added items to the officer advances worksheet through 1995.

Detailed entries are listed on the worksheet for the years 1985 through 1991. After that, the entries decrease significantly. The majority of the entries are debits, and come prior to September 1994. The last page of the ledger contains the entries that are at issue in this motion. That page lists several credits, including the proceeds of both the Debtor's and Tommy Grove's IRAs, which were cashed out. These credits are the evidence the Hugger Trustee relies upon to defeat the statute of limitations argument. The Hugger Trustee admits that the bulk of the officer advances occurred prior to the three year reach-back period, but argues that the credits on the account, which fall within the statute of limitations, operated as a reaffirmation of the debt and tolled the running of the statute.

The Debtor and Tommy Grove assert that the credits were not intended as payments against the amounts due on officer advances, but instead were infusions of cash into an ailing business. Tommy Grove's affidavit describes the cashing out of the IRAs as their loaning or giving Hugger money back.

Once the statute of limitations is pleaded as a defense, the burden shifts to the plaintiff to show that the action was brought within the applicable period. Swartzberg v. Reserve Life Ins., 252 N.C. 150, 113 S.E.2d 270 (1960). While an acknowledgment of a debt or a new promise to pay a debt may toll the running of the statute of limitations, that promise to pay or acknowledgment of the debt

must be express, unconditional, definite and unqualified. Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

Even taking all inferences in favor of the Hugger Trustee on this point, the court finds that he has not met the burden of proof on demonstrating legally actionable receivables. The Hugger Trustee's claim relies solely on the officer advance ledger and an affidavit by a Capps Foster accountant who performed Hugger's audits. The affidavit explains the maintenance of the ledger, but does not support the Hugger Trustee's contention that the credits posted in 1994 and 1995 were intended to reaffirm the debt owed by the Debtor and Tommy Grove to Hugger. The accounting ledger does not amount to an express, unconditional, definite or unqualified acknowledgment of the debt. The amounts advanced to the Debtor and Tommy Grove extend beyond the three years prior to the filing of the bankruptcy. Therefore, the Hugger Trustee is precluded from suing for these amounts based on the North Carolina three year statute of limitations. The officer advance claims are therefore struck as being time-barred.

Breaches of Fiduciary Duty

The Trustee's breach of fiduciary duty claims against the Groves arise from two theories²: (1) the Groves' failure to collect

2

The pleadings in this action leave much to be desired, but reflect the lack of current records and the unusual manner in which this action was joined. Although he lacked current Hugger records, due to the claims bar date in the Carole Grove Bankruptcy case, the Hugger Trustee was forced to file a "best estimate" proof of claim. In that proof, the Trustee indicated that he would file amendments as information became available.

Ordinarily, this claim would not have been addressed until

outstanding Hugger accounts receivable from one another, from relatives and from other insiders; and (2) from the Groves' alleged diversion of Hugger assets prior to bankruptcy. Most of these alleged breaches occurred in the early 1990s, but at least two (the alleged off-the-books cash sales of company assets and the transfers of Hugger property to Hugger de Honduras) occurred shortly before Hugger's 1997 bankruptcy. These two claims would not be time barred under either limitations period.

As to the earlier alleged breaches, most of these claims were contained in a complaint that Tommy Grove had drafted for use in a suit against Carole Grove in 1993. That action was never filed. Just why is unclear.³

Both Carole Grove and Tommy Grove argue that the fiduciary duty claims are subject to the three year statute of limitations of NCGS § 1-52, and are time barred. The Hugger Trustee disagrees, arguing that these causes are governed by a ten year statute of

the end of the Carole Grove Bankruptcy case in the summary claims objection process. However, Carole Grove chose to file a motion to dismiss this proof of claim, and thereafter filed this declaratory judgment action contesting the claim. In his Answer/Counterclaim/Third Party Claim, the Hugger Trustee incorporated by reference both his proof of claim and his Response to Carole Grove's Motion to Dismiss that proof of claim.

Unfortunately, the corporate records are still missing and the Trustee has been forced to rely on the limited information obtainable from third parties. As such, the lack of precision in stating the factual circumstances giving rise to his claims is understandable, if not preferable.

3

The alleged reasons include his inability to get the Board to authorize the suit, given the 50-50 stock split; Carole's promise to repay these monies; or his election not to pursue the claims.

limitation under NCGS § 1-56. If true, this would make all of these claims timely.

The Trustee's claims are for breaches of duty by the Groves as officers and directors of Hugger. North Carolina law has long recognized that officers and directors are fiduciaries for their corporations. Walter R. Hinnant, Comment, Fiduciary Duties of Directors: How Far Do They Go?, 23 Wake Forest L. Rev. 163 (1988); Snyder v. Freeman, 300 N.C. 204, 266 S.E.2d 593 (1980). More recently the duty has been codified in the North Carolina Business Corporation Act, NCGS §§ 55-8-30 and 55-8-42.

These duties extend from an officer/director to his corporation, but usually not to the corporation's creditors. Only when a corporation is in a condition akin to a "winding up," do its officers/directors owe a fiduciary duty to creditors. Whitley v. Carolina Clinics, Inc., 118 NC App. 523, 455 S.E.2d 896 (1995). For this reason, Carole Grove suggests that the Hugger Trustee cannot bring this action for the benefit of Hugger's creditors.

This Court disagrees. While a recovery by the Trustee would benefit Hugger's creditors, legally the Trustee is asserting these claims as the corporation. A bankruptcy filing causes all of a corporate debtor's assets, including its causes of action, to become estate property. 11 U.S.C. § 541. The Chapter 7 Trustee displaces management of the corporation and succeeds to control over the corporation's rights and assets. Commodities Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985).

Because a corporation can sue its directors and officers for breaches of their duties, so can its Chapter 7 trustee. This is true even though practically the recovery would be disbursed to creditors who, under the Bankruptcy Code, enjoy a higher distribution priority than shareholders. Johns-Manville Sales Corp. v. Townsend, 248 N.C. 687, 690, 104 S.E. 2d 826, 828 (citing 8 C.J.S. Bankruptcy § 337, p. 1092). The Hugger Trustee therefore has standing to maintain an action against the Groves for alleged breaches of their duties as officers and directors.

What then is the applicable statute of limitations when a North Carolina corporation asserts a breach of duty claim against its officers and directors under NCGS §§ 55-8-30 and 55-8-42? This Court believes that the limitations period for such actions is ten years.

No limitations period is mentioned in NCGS §§ 55-8-30 and 55-8-42. Rather, reference is made to Article 5 and 5A of the General Statutes, wherein the Legislature has established limitations periods for legal claims not involving real property. Within these articles, individual statutes provide for limitations periods of a given number of years. Each section then contains a list of causes of action which are subject to that period. For example, § 1-52, "Three Years," provides a three year statute of limitations for breach of contract and fraud actions, among other causes.

Causes of action not specifically listed in these sections are covered by a catch-all provision, § 1-56. That provision states that if a cause of action is not otherwise listed, its statute of limitations is ten years.

Actions by a corporation against its officers and directors under NCGS §§ 55-8-30 and 55-88-42 are not specifically listed in Article 5. Therefore, as a matter of statutory construction, such actions should fall under the § 1-56 catchall and be subject to a ten year limitation period.

Hoping to avoid this result, the Groves cite several North Carolina cases which they say set a three year statute of limitations period for a breach of fiduciary duty.⁴ The Trustee cites a similar number of cases favoring a ten year statute.⁵

A review of these cases reveals much conflict in the law about which statute of limitations applies in lawsuits against fiduciaries in general. However, none of the opinions mandate a three year statute of limitations in the present case.

First, the cases cited by the defendants are not controlling. None of them involves the issue of the proper statute of limitations for an action against directors and officers under NCGS §§ 55-8-30 and 55-8-42. Rather, this appears to be a question of first impression in North Carolina.⁶

4

Tyson v. N.C.N.B., 305 N.C. 136, 286 S.E.2d 561 (1982); Dawn v. Dawn, 122 N.C. App. 493, 470 S.E.2d 341 (1996); Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995); Peeler & Co., Inc., 96 N.C. App. 118, 384 S.E.2d 283 (1989).

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Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979); Barger v. Hillard & Parks, 120 N.C. App. 326, 462 S.E. 2d 252 (1995); Adams v. Moore, 96 N.C. App. 359, 385 S.E. 2d 799 (1989); Speck v. N.C. Dairy Foundation, Inc., 64 N.C. App. 419, 307 S.E.2d 785 (1983); Jarrett v. Green, 230 N.C. 104, 52 S.E. 2d 233 (1949).

6

One may not on a wholesale basis import the law pertaining to other types of fiduciaries to directors and officers under the Business Corporation Act. As § 1 of the Official Comment to 55-8-30 notes: "[S]ection 8.30 does not use the term fiduciary...because

However, even as persuasive authority, the cases cited are so varied and so contradictory to one another that it is difficult to draw many general conclusions. These cases deal with several different types of fiduciaries: executors and beneficiaries, husbands and wives, mothers and sons, etc. They address different causes of action. Some of the actions are grounded in negligence, others are for breach of contract. Still other cases are for actual fraud, constructive fraud, or even unjust enrichment. In some, several different claims are pled together and the question of the statute of limitations is discussed as if there is only one cause of action. Even the remedies sought vary: some cases seek damages, while others seek recognition of express trusts; still others ask for equitable remedies including resulting trusts, constructive trusts, and accountings.

Even the logic employed varies from case to case, and sometimes within a single case. For example, in Tyson v. N.C.N.B., 305 N.C. 136, 139, 286 S.E.2d 561, 563 (1982), on which Carole Grove relies, the Court analogizes a fiduciary duty suit against an executor to a breach of contract action. In finding a three year statute applicable, that court determines the statute of limitations based upon the nature of the underlying cause of action. However, Tyson goes on to distinguish other North Carolina cases employing a ten year limitations period, not because they involve claims of a different nature, but because they sought a

that term could be confused with the unique attributes and obligations of a fiduciary imposed by the law of trusts, some of which are not appropriate for directors of a corporation."

different remedy--money damages versus a constructive trust. Id. 141, 286 S.E.2d at 564.

Finally, based on Tyson, it appears that the North Carolina Supreme Court views breach of fiduciary duty not as a single type of action but as several different causes, with the statutes of limitations determined by the type of fiduciary relationship involved (e.g., executor or husband/wife). After distinguishing these other cases, Tyson says the statute of limitations for breach of a fiduciary duty owed by an executor is a question of first impression. Id. at 141, 286 S.E.2d at 564.

Only a few general trends can be found in the fiduciary duty cases. A first line of decisions, represented by Jarrett and Speck, view breach of fiduciary duty actions as akin to actions to impose a constructive trust and employ a ten year statute.⁷

A second line of cases equates breach of fiduciary duty with constructive fraud, but also concludes that a ten year statute of limitations applies under § 1-56.⁸

7

Jarrett v. Green, 230 N.C. 104, 52 S.E.2d 223 (1949); Speck v. North Carolina Dairy Foundation, Inc., 64 N.C. App. 419, 307 S.E. 2d 785 (1983), rev'd, 311 N.C. 679, 319 S.E.2d 139 (1984).

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See Adams v. Moore, 96 N.C. App. 359, 362, 385 S.E.2d 799, 801 (1989); Barger v. McCoy Hillard & Parks, 120 N.C. App. 362, 336, 462 S.E.2d 252, 259 (1995), rev'd on other grounds, 346 N.C. 650, 488 S.E.2d 215 (1997). Both the Debtor and Tommy Grove attacked the Adams case as bad law, on the grounds that it misconstrues the claim of constructive fraud. In Barger, the North Carolina Court of Appeals solidified the findings of Adams regarding application of the ten year statute of limitations to claims of constructive fraud based on breach of fiduciary duty. Barger was subsequently appealed to the North Carolina Supreme Court, which held the plaintiffs failed to state a claim for constructive fraud and did not reach the statute of limitations question. Because the Supreme Court did not alter the holding of Adams, this court previously accepted Adams and Barger as the law of North Carolina on that issue. However, the Court has now reconsidered its position and finds that neither Adams nor Barger is necessarily controlling in the context of the present case.

Finally, there are cases like Tyson, which treat breaches of some types of fiduciary duties, particularly those of an executor to a decedent's estate, as being contractual in nature (even in the absence of a contract) and therefore adopt the three year statute prescribed for contracts in § 1-52(1).⁹

A reconciliation of these divergent cases was attempted by the North Carolina Court of Appeals in Speck v. North Carolina Dairy Foundation, Inc., 64 N.C. App. 419, 307 S.E. 2d 785 (1983), rev'd, 311 N.C. 679, 319 S.E.2d 139 (1984). Speck involved a professor who sued his university and a related foundation, seeking to share in royalties received on account of a milk sweetening process that the professor had discovered. The University/Foundation defended, arguing that under the terms of Speck's employment these sums belonged to the university, and that Speck's breach of fiduciary duty and unjust enrichment claims were barred by a three year statute of limitations.

The trial court ruled for defendants, but the Court of Appeals reversed. It concluded: (1) the defendants were fiduciaries for Speck, and (2) a ten year statute of limitations applies to breach of fiduciary duty suits. In reaching its holding, the Court of Appeals analyzed several of the cases cited in this action and came to this conclusion:

Though the decisions...involving fiduciary relationships and the statutes of limitation are neither entirely clear nor consistent, as we understand them they nevertheless sanction our holding [of a ten year statute].

Speck, 64 N.C. App. at 427, 307 S.E.2d 791.

This Court agrees with both the holding and the analysis of the Court of Appeals in Speck. As that ruling points out, under North Carolina law a breach of a fiduciary relation gives rise to a constructive trust. While express trusts (a form of contract) are subject to a three year statute of limitations, actions seeking constructive trusts have long enjoyed a ten year statute. Id. at 426, 307 S.E.2d at 790 (citing Bowen v. Darden, 241 N.C. 11, 84 S.E.2d 289 (1954)).

Before § 1-52 was adopted, North Carolina law distinguished between actions grounded in tort/fraud and those based in contract. Fraud and other wrongful torts fell under a ten year limitations period; contract actions received a three year period. Id.

Being more akin to fraud than contract, fiduciary duty actions received a ten year statute. More recently, the limitations period for fraud was codified and shortened to three years. However, no corresponding change was made to the statute of limitations for constructive trusts. North Carolina continues to apply a ten- year statute of limitations to constructive trusts. Id. (citing Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979)).

Finally, Speck concludes that by not specifically listing breach of fiduciary duty actions in a particular limitations statute, the Legislature intended that such actions fall within the ten year catchall of § 1-56. Id. at 426, 307 S.E.2d at 791.

The Groves attack this reasoning on several grounds. First they point out that the North Carolina Supreme Court reversed Speck on appeal. See Speck v. N.C. Dairy Foundation, Inc., 311 N.C. 679,

319 S.E.2d 139 (1984). This is true, but not because the lower court chose an incorrect statute of limitations. Rather, the North Carolina Supreme Court felt that under the facts presented, the University/Foundation owned the milk sweetening process and therefore had not breached any fiduciary duty owed to Speck. Id. at 86-89, 319 S.E.2d at 143-44. The Court of Appeal's conclusions regarding the statute of limitation for breach of fiduciary duty actions were not reversed or even discussed in the Supreme Court's opinion, suggesting that it was comfortable with the analysis.

Second, Carole Grove maintains that breach of fiduciary duty is "constructive fraud;" that constructive fraud is just a type of fraud; and therefore the three year limitation period for fraud claims under § 1-52 applies.

This same argument was made and rejected in Speck. True, breach of a fiduciary duty is "constructive fraud." However, under North Carolina law, actual fraud and constructive fraud are different causes of action having different elements:

Breach of fiduciary duty occurs when there is unfair dealing with one to whom the defendant has an active responsibility; it requires a special relationship, unlike actual fraud." Thus, although actual fraud and constructive fraud share the name of "fraud," they are different causes of action which should come under different causes of action.

Id. (citing Link v. Link, 278 N.C. 181, 179 S.E.2d 697 (1971); Miller v. First National Bank of Catawba County, 234 N.C. 309, 67 S.E.2d 362 (1951)).

Again, this Court agrees. Intent to deceive, an element of actual fraud, is not essential to a finding of constructive fraud/breach of fiduciary duty. The latter will be found simply upon a showing of the "slightest trace of undue influence or unfair

advantage." Link, 278 N.C. at 192, 179 S.E.2d at 704. Additionally, North Carolina law requires a lesser standard of proof to make out a claim for breach of fiduciary duty than it does for actual fraud. Vail v. Vail, 233 N.C. 109, 113-114, 63 S.E.2d 202, 205-06 (1951). Since constructive fraud/breach of fiduciary duty is a different cause of action than actual fraud, there is no reason why the same limitations periods must apply.

Third, Carole Grove suggests that the Trustee did not seek a constructive trust, but had he done so, the remedy could not have been employed because this is a bankruptcy case. Therefore, she concludes, the ten year statute for bringing constructive trust actions should not apply. This argument is flawed, both factually and legally.

Factually, Carole Grove is wrong. The Hugger Trustee has pled for a constructive trust and an accounting in this action. This relief is requested both in his proof of claim and in his response to Carole Grove's motion to dismiss his proof of claim. These, in turn, are incorporated into his Answer and Counterclaim. His Third Party Claim republishes his Answer and Counterclaim, and Count III of his Third Party Claim specifically asks for an accounting against Thomas Grove for Hugger de Honduras.

Rationally, if one looks at Article 5, it becomes clear that under North Carolina law, it is the nature of the claim, and not the remedy sought which controls the statute of limitations (c.f., one year for libel; three years for trespass, negligence or conversion).

Finally, it is certainly true that employing a state law equitable remedy such as a constructive trust is disfavored in bankruptcy. However, this is not because the Court lacks the power to do so, but because such remedies usually upset the Code's distribution scheme. The Bankruptcy Code sets priorities between creditors as to scarce estate assets. Imposing a constructive trust on estate assets for the benefit of a single creditor affords that claimant preferred status, usually to the harm of the other creditors. Nevertheless, where circumstances make it equitable in the broad sense, the doctrine has been employed in this bankruptcy court and in others across the nation.

Moreover, the constructive trust doctrine exists to protect creditors, not the debtor. Carole Grove's bankruptcy estate may prove to be solvent. If so, other creditors' interests may not be harmed by the imposition of a constructive trust in favor of the Hugger Trustee. Certainly, there would be no prohibition from doing so as to Tommy Grove, who is not a debtor at all.

Finally, Carole Grove suggests that Tyson and recent North Carolina Court of Appeals cases control and dictate the three year statute. This Court cannot so conclude. As noted, none of these cases was filed under the Business Corporation Act. However, even under the general law on breach of fiduciary duty, the cited cases would not be controlling.

Tyson v. N.C.N.B., 305 N.C. 136, 142, 286 S.E.2d 561, 564 (1982), was an action against an executor based on a negligence theory (the executor failed to discover title to property in the decedent's estate). It was not a dispute involving alleged self-

dealing or undue influence such as in the current case. Also, in Tyson, the plaintiff sought damages only; here, we also have a request for a constructive trust or accounting.

Given these distinctions, the current case is more closely analogous to Jarrett v. Green, 230 N.C. 104, 52 S.E.2d 223 (1949), and Cline v. Cline, 297 N.C. 336, 255 S.E.2d 399 (1979), than it is to Tyson.

In Jarrett, beneficiaries of an estate brought an action against the executor alleging self-dealing and praying for a constructive trust and an accounting. The North Carolina Supreme Court applied the ten year statute of limitations.

In Cline, where a husband's violation of his fiduciary duties to his wife caused her to seek a constructive trust, again the North Carolina Supreme Court held that a ten year statute of limitations applied.

Because she feels the Supreme Court's opinion in Tyson controls, Carole Grove criticizes reliance on the Court of Appeals' decisions in Speck and its progeny, Barger v. McCoy Hillard & Parks, 120 N.C. App. 362, 462 S.E.2d 252 (1995), rev'd on other grounds, 346 N.C. 650, 488 S.E.2d 215 (1997), and Adams v. Moore, 96 N.C. App. 359, 385 S.E.2d 799 (1989). However, Carole Grove also cites two recent Court of Appeals decisions, Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995) (applying a three year statute to plaintiff's claims of fraud, conversion and breach of fiduciary duty against executrix) and Dawn v. Dawn, 122 N.C. App. 493, 470 S.E.2d 341 (1996) (three year statute for breach of fiduciary duty against a trustee under a deed of trust)

Obviously, this Court must apply the law as interpreted by the highest court in North Carolina. The state Supreme Court's Cline and Jarrett opinions are factually closer to the current case than Tyson, and are therefore controlling. While Davis and Dawn are the most recent cases dealing with statute of limitations issues in breach of fiduciary duty actions, they cannot take precedence over prior Supreme Court holdings.

Furthermore, neither Davis nor Dawn contains any in-depth analysis of the law on statutes of limitations. Rather, each simply cites an earlier North Carolina case without elaboration. In fact, Dawn miscites Tyson for the proposition that a three year statute applies to actions seeking damages for a trustee's breach of fiduciary duty. Dawn, 122 N.C. App. at 495, 470 S.E.2d at 343. In point of fact, Tyson says that a three year statute applies to express trust actions, and the ten year statute applies to constructive trust actions. Tyson, 305 N.C. at 141-42, 286 S.E.2d 564-65.

Moreover, since none of these cases involves an action against directors and officers under the Business Corporation Act, and in view of the turmoil in the case law about statutes of limitation for breaches of fiduciary duty generally, this Court will follow the plain language of Section 1-56. The ten year statute of limitations is applicable.

Insufficient Facts Argument

Changing gears, Carole Grove contends that the Hugger Trust has asserted no facts which would demonstrate a breach of duty and thereby withstand a summary judgment motion. This Court believes

otherwise. As they currently stand, the pleadings, proof of claim and Response to the Motion to dismiss, sufficiently describe facts and circumstances which if proven could lead a jury to find in the Hugger Trustee's favor. The facts are not artfully presented, but they are sufficient--particularly since it is the defendant's failure to preserve the Hugger corporate records, and Carole Grove's failure to make discovery in this action (Reference is made to this Court's Order dated January 20, 2000) which has occasioned the lack of factual detail.

Set-Off

Tommy Grove's motion for summary judgment also requests a ruling on his set-off rights. Tommy Grove has filed a claim against the Hugger estate for back wages, and requests that set-off under 11 U.S.C. § 553 be applied. This issue is not ripe. The Hugger Trustee's claim against Tommy Grove is not for a specific sum. Only after trial will it be known what, if any, judgment the Hugger Trustee will have against Tommy Grove. Therefore, this Court cannot find that Tommy Grove is entitled to set-off as a matter of law.

Joint and Several Liability

Tommy Grove's motion to amend judgment also requests that the Court rule that any claims the Hugger Trustee may have against the Groves for breach of fiduciary duty would not be joint and several. This is important to Tommy Grove because entireties property was sold earlier by the Carole Grove bankruptcy trustee and the proceeds have been escrowed. If Tommy Grove is found either not liable for breach, or if his liability was individual, and not

joint and several with Carole Grove, he contends that any judgment by the Hugger trustee against him could not reach these proceeds.

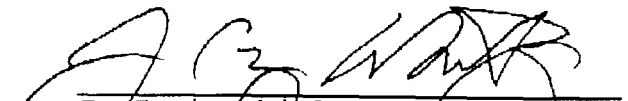
Tommy Grove's theory essentially is that being estranged from Carole Grove, he and she could not be acting in concert, so as to be joint and several within the meaning of White v. Kellar, 242 N.C. 97, 86 S.E.2d 795 (1955). This may be the conclusion of the court after trial, but it is not one that can be reached as a matter of law at this time.

Carole and Tommy Grove were directors and officers of Hugger when these acts occurred. Exactly who did what with regard to the debtor's assets is still very much in doubt. And even if as Tommy Grove suggests, liability were found because Carole Grove diverted assets, and he failed to take steps to stop her from doing so, their liability would arise from the same set of facts and circumstances, the same relationship to Hugger (directors and officers), and the same legal duties (loyalty and reasonable care). Tommy Grove has presented no authority which would dictate under those circumstances that their liabilities under §§ 55-8-30 and 55-8-42 would be individual, and not joint. For all of these reasons, it appears that the nature of any such liability would be a question of material fact.

IT IS THEREFORE ORDERED that the motion of Carole L. Grove for summary judgment be GRANTED as to the officer advances claim and DENIED as to the breach of fiduciary duty claims.

IT IS FURTHER ORDERED that the motion of Thomas D. Grove for summary judgment be GRANTED as to the officer advances claim and

DENIED as to the breach of fiduciary duty claims, the request for set-off, and the request for a ruling on joint and several liability.



J. Craig Whitley
United States Bankruptcy Judge